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In the Supreme Court of the United States

OCTOBER TERM, 2002

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GEORGE H. BALDWIN,

Petitioner,

v.

MICHAEL REESE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

By statute and this Court's caselaw, a state prisoner must exhaust available state court remedies on direct appeal or through collateral proceedings before a federal court may consider granting habeas corpus relief. This Court has held that exhaustion requires a state prisoner to fairly present his claim to the state's highest court and that fair presentment requires the prisoner to have alerted the state court that the claim is a federal one.

Does a state prisoner "alert" the State's highest court that he is raising a federal claim when — in that court — he neither cites a specific provision of the federal constitution nor cites at least one authority that has decided the claim on a federal basis?

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PETITION FOR WRIT OF CERTIORARI

Petitioner George H. Baldwin ("the State")[1] respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *Reese v. Baldwin*, No. 01-35153 (March 12, 2002), *reh. den.* (September 3, 2002).

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 282 F.3d 1184 (2002), and is attached to this petition as Appendix A. The district court's opinion is not reported and is attached to this petition as Appendix B.

JURISDICTION

Jurisdiction to review the judgment by writ of certiorari is conferred on the Court by 28 U.S.C. § 1254(1). The Ninth Circuit Court of Appeals' opinion was dated and filed March 12, 2002. The State timely filed a petition for rehearing and suggestion for rehearing en banc. By order filed September 3, 2002, the court denied that petition. A copy of that order is attached as Appendix C. This petition is filed within the 90-day period following the denial of rehearing as prescribed by 28 U.S.C. § 2101(c) and Rule 13(3) of the Rules of the Supreme Court of the United States.

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[1] This case involves numerous proceedings below and the labels attached to the parties changed accordingly. In order to avoid confusion, petitioner Baldwin refers to the parties as "Reese" and "the State" rather than by their roles in the various proceedings.

STATUTE INVOLVED

28 U.S.C. § 2254 provides, in part:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —

> (A) the applicant has exhausted the remedies available in the courts of the State; * * *

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

STATEMENT OF THE CASE

Reese was convicted in state court of kidnapping (two counts) and attempted sodomy. The trial court gave Reese a determinate sentence of 30 years on the kidnapping convictions. On appeal, the Oregon Court of Appeals affirmed the convictions but remanded for resentencing because the trial court had left out a step in the sentencing process. The trial court resentenced Reese, Reese again appealed, and again the court of appeals remanded for resentencing because the trial court had not properly complied with the additional step that it had omitted from the first sentencing. Following the second resentencing, Reese again appealed. His appointed appellate counsel could find no non-frivolous issues in the appeal, so he filed a "*Balfour*" brief, which is Oregon's analogue to an *Anders* brief. *See State v. Balfour*, 311 Or.

434, 814 P.2d 1069 (1991). As required in a *Balfour* brief, counsel assisted Reese in presenting the issues he wished to raise on appeal; Reese raised five assignments of error. The court of appeals affirmed. Reese did not file a petition for review in the Oregon Supreme Court.

Reese then filed a *pro se* petition for post-conviction relief (PCR) in the state trial court. The court appointed counsel, who filed an amended PCR petition asserting, among other claims, ineffective assistance of both trial and appellate counsel. The amended petition, unlike the original *pro se* petition, specifically cited provisions of the federal and state constitutions in support of Reese's claims.[2] The trial court, in a written opinion, denied

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[2] The amended petition stated, in part:

> Petitioner was denied adequate assistance of appellate counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States and under Article I, Section 11, of the Constitution of Oregon, in that counscl on appeal failed to:
>
> a. Withdraw as attorney for Petitioner due to conflict of interest in that her husband * * * had been the attorney for prosecution three times on Petitioner's cases;
>
> b. Notify Petitioner in advance when she removed Petitioner's attorney * * * from Petitioner's case and became the attorney of record for Petitioner without Petitioner's consent;
>
> c. Raise issues that had been preserved for appeal;
>
> d. File a timely Notice of Appeal;

Reese's PCR petition. In denying Reese's ineffective assistance of appellate counsel claim, the trial court cited a federal case, *Jones v. Barnes*, 463 U.S. 745 (1983). The PCR trial court also denied his ineffective assistance of trial counsel claim, citing both federal and state cases.

On appeal, Reese's newly-appointed counsel, unable to identify any non-frivolous issues, prepared a *Balfour* brief that set forth the statement of the case and then, at Reese's request, incorporated into the brief claims of error that Reese had set out in his *pro se* PCR petition.[3] As a result, Reese asserted a claim for "ineffective assistance of appellate counsel," but without any reference to federal law, federal constitutional provisions, or authorities construing federal provisions on which he might be relying.[4] The court of appeals summarily affirmed the PCR trial court's judgment in an unpublished order.

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e. Obtain trial transcripts in a timely manner and in order to provide a thorough and proper appeal.

[3] The Ninth Circuit mistakenly suggested that the responsibility for deciding to incorporate Reese's original PCR petition, rather than the amended petition, into Reese's Court of Appeals brief was that of Reese's appointed appellate counsel. App-6. As the State pointed out in its petition for rehearing, under Oregon's *Balfour* procedure, it is the appellant who chooses which claims to present in the *pro se* portion of the brief, not counsel. *See Balfour*, 311 Or. at 452, 814 P.2d at 1080 ("Counsel * * * shall present to the court in the brief the issue that the client seeks to raise in the manner that the client seeks to raise it.").

[4] Reese's brief set forth his claim as follows:

Second Claim for Relief: Ineffective Assistance of Appellate Counsel.

Reese's counsel then filed a petition for discretionary review in the Oregon Supreme Court.[5] The petition included a cursory statement that one of the issues presented was the adequacy of appellate counsel. The petition contained no citation to any constitutional provision or authority of any kind; nor did it contain any argument in support of the claim.[6] The supreme court denied the petition in an unpublished order.

Facts: Mr. Jesse Wm Barton [(Reese's second appellate counsel)] did knowingly and willfully fail to file in a timely matter [*sic*] a notice of my intention to appeal in the Oregon ruling [*sic*] to the Oregon Supreme Court as I had informed their office by mail. Their response was that I had to file pro-se and that they would not help me. I informed them that previous case law indicated that this is per se ineffective assistance of counsel.

Mr. Jesse Wm. Barton did fail to raise issues on appeal. The prosecuting Attorney's [*sic*] did state in their Brief that I the defendant did fail to raise the issues in my arguments. It is not that I the defendant failed to raise the arguments but that this Attorney failed to raise the issues for me as I asked stating that I was to raise the issues on Post-Conviction.

[5] Unlike the Court of Appeals brief, the petition in the Supreme Court was not submitted in accordance with the *Balfour* procedure; it was fully prepared by Reese's counsel and did not include a *pro se* portion.

[6] In the "Statement of legal questions presented on review," "Statement of reasons for reversal of Court of Appeals and "Statement of Facts," Reese stated, *inter alia*, that he was setting forth "errors with respect to * * * ineffective assistance of both trial court and appellate court counsel." In the "Argument" section of the petition, Reese restated, without argument, that he was asserting "in-

Reese next filed a *pro se* federal habeas corpus petition; the district court appointed counsel and counsel filed an amended petition that included a claim that Reese had received ineffective assistance of counsel on direct appeal from his criminal conviction. The district court concluded that Reese had not properly exhausted in state court his federal claim of ineffective assistance of appellate counsel and that the claim was procedurally defaulted. The district court denied Reese's other claims and entered judgment dismissing his petition. App-38.

Reese appealed to the United States Court of Appeals for the Ninth Circuit. The court noted that the only issue before it was the district court's determination that Reese had procedurally defaulted his claim of ineffective assistance of appellate counsel. App-9. In a footnote, the court observed that there was no serious contention that, if there were procedural default, Reese could satisfy the "cause and prejudice" requirement or demonstrate that the court's refusal to hear the claim would result in a "fundamental miscarriage of justice," excusing the procedural default. App-9.

In its opinion, the Ninth Circuit devoted several pages to explaining the proper analysis that it believed should be applied in determining the exhaustion/procedural default question. App-10 to App-14. Citing to *Lyons v.*

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effective assistance of counsel." He did, however, conclude the argument section of the petition with the following statement concerning his *trial* counsel: "Moreover, since Petitioner asserts he was coerced and threatened by counsel to waive his right to trial by jury, Petitioner believes his 5th, 6th and 14th amendment rights have been violated."

Crawford, 232 F.3d 666 (9th Cir. 2000), *as modified by* 247 F.3d 904 (9th Cir. 2001), the court correctly stated that "a habeas petitioner must indicate to the state's highest court the specifically federal nature of a claim in order to exhaust it. Accordingly, presenting a federal claim explicitly at the PCR court in itself is not sufficient for exhaustion." App-13. The court then concluded that this "indication" requirement was satisfied as to the State's intermediate appellate court because "[e]ven though Reese's brief to the Oregon Court of Appeals did not cite federal authority, * * * the PCR court's citations to *Strickland* [*v. Washington*, 466 U.S. 668 (1984),] and *Jones v. Barnes* placed the Oregon Court of Appeals on notice that it was reviewing a federal question that the PCR court decided on explicit federal grounds." App-15.

Employing essentially the same analysis, the Ninth Circuit also concluded that Reese properly had presented his federal claim to the Oregon Supreme Court. The court assumed that, "simply by reading the PCR court decision," which was not attached or referred to in the petition for review, "the Oregon Supreme Court would have been alerted that the claim for ineffective assistance of appellate counsel was decided and affirmed on the basis of federal law." App-17. Moreover, the court deemed it irrelevant whether the state supreme court had actually read the trial court's opinion; what was important was that it "had the opportunity" to read it. App-18. And because the supreme court had the opportunity to read the trial court's opinion, the Ninth Circuit concluded that Reese had "fairly presented" his federal claim of ineffective assistance of appellate counsel to the Oregon Supreme Court. App-19.

REASONS FOR GRANTING THE WRIT

Since 1886, this Court has required state prisoners to exhaust their federal claims in state court before those claims can be considered in a federal habeas corpus proceeding. Yet few procedural issues plague federal courts more consistently than the question whether state prisoners have exhausted and, thus avoided procedurally defaulting, their federal claims in state court. *See Castille v. Peoples*, 489 U.S. 346, 349–350 (1989) ("Today we address again what has become a familiar inquiry: '*To what extent* must the petitioner who seeks federal habeas exhaust state remedies before resorting to the federal court?'") (emphasis in original, citation omitted). Lower federal courts have grappled, often laboriously, with the question of whether state prisoners have "fairly presented" their claims.

Although this Court has imposed an explicit requirement that state prisoners "fairly present" their federal claims first in state courts before they can be raised in federal habeas corpus, the federal courts have treated that requirement in very different ways. The approaches followed by the majority of circuits have not been faithful to this Court's recent pronouncements. It has been over seven years since this Court's decision in *Duncan v. Henry*, 513 U.S. 364 (1995), where the Court made clear that, to satisfy exhaustion/procedural default requirements in federal habeas litigation, state prisoners must "alert" state courts that they are bringing federal claims in state court—that if they wish to raise a federal claim in state court they must "say so" just as they must in federal court. Yet, with a few exceptions, the federal circuit

courts seemingly have not paid attention to or have not grasped the significance of *Duncan*'s lessons. They do not insist that state prisoners, in their state appellate filings, "say so" when they wish to raise a federal claim in state court. Instead, a majority of the federal courts continue to strive to discern for themselves the true substance of the claims prisoners raised in state courts, rather than requiring state prisoners to have stated, expressly, in the State's highest appellate court that they are raising federal claims.

Notwithstanding efforts by this Court to shed some light on the meaning of "fair presentment," lower courts employ at least three separate tests in resolving "fair presentment" issues. The tests used by a majority of the circuits do not require the state prisoner to articulate clearly his federal claim in the state courts. Instead, a federal courts attempt to discern the true nature of a state prisoner's underlying claim—in effect, whether the "substance" of the claim presented in state court was federal in nature. That quest has proved elusive at best; it has swallowed precious time and resources of the courts and the parties; and it has produced uncertainty and inconsistency in results.

Moreover, the test used by a majority of the courts fails to recognize the principles of state-federal comity that this Court clearly has stated underlie the exhaustion requirement. In *Picard v. Connor*, 404 U.S. 270, 275 (1971), this Court explained that underlying principle as follows:

> It has been settled since *Ex parte Royall*, 117 U.S. 241 (1886), that a state prisoner must nor-

mally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus. The exhaustion-of-state-remedies doctrine, now codified in the federal habeas statute, 28 U.S.C. § 2254(b) and (c), reflects a policy of federal-state comity, "an accommodation of our federal system designed to give the State an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." We have consistently adhered to this federal policy, for "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." It follows, of course, that once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied.

(footnote and citations omitted).

The confusion among the circuits suggests that this Court needs to clarify the meaning of "fair presentation" and provide a bright-line test that requires state prisoners unambiguously to identify in the state courts the federal nature of any claim. A requirement that a prisoner clearly state his federal claim in state court imposes little burden on the petitioner, while providing enormous benefits in the efficient processing of the federal courts' habeas litigation. Such a requirement also is faithful to the comity concerns underlying the exhaustion principle. The Ninth Circuit did not employ that approach below and, as a result, it erroneously concluded that Reese had exhausted his federal claim in state court. This case presents the

Court with the opportunity to provide circuit courts with badly needed clarification of the meaning of "fairly presented" in federal habeas litigation and, in doing so, to bring consistency to federal circuits' efforts to resolve exhaustion/procedural default questions. This Court should seize that opportunity, grant the petition for writ of certiorari, and reverse the decision of the Ninth Circuit.

This petition first will briefly discuss this court's two most recent cases in the area—*Duncan v. Henry* and *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). The petition then will canvass the circuits and identify the different tests currently used to resolve exhaustion/procedural default questions, tests that are inconsistent and that, at least for the majority of circuits, ignore this Court's recent admonitions. Next, the petition will address how the tests used by the majority of the circuits fail to give proper respect to the federal-state comity concerns that underlie the exhaustion requirement. Finally, the petition will explain why the Ninth Circuit decision below affords the Court the opportunity to address and resolve a problem that appears to have perplexed many federal courts.

I. Most circuits—including the Ninth Circuit—have ignored this Court's admonitions regarding the necessity of a habeas petitioner explicitly presenting a federal issue to a State's highest court.

In two recent cases, this Court has clarified the exhaustion requirements for federal habeas purposes. In both cases, a comparison of the majority and dissenting opinions demonstrates that the Court endeavored to

adopt clear, workable rules to guide courts in the exhaustion/procedural default arena. And those rules should have been easy to apply. Nonetheless, as will be shown in the next section, the lower courts have failed to heed this Court's efforts.

In *Duncan v. Henry*, this Court concluded that Henry, a federal habeas petitioner, had not raised a federal due process claim in state court and thus, had procedurally defaulted that claim for federal habeas purposes. The Ninth Circuit, employing what to then had been fairly standard exhaustion/procedural default principles, had concluded that Henry had "fairly presented the substance of his federal claim to the state courts," thereby satisfying the exhaustion/procedural default requirements of § 2254. *Henry v. Estelle*, 33 F.3d 1037, 1040–41 (9th Cir. 1993) (relying on *Picard v. Connor* and *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (stating that the purpose of the "fair presentation" requirement is to provide the state courts with a "fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim.")). The Ninth Circuit reached this conclusion because, although not labeling his state court claims in federal terms, Henry had made essentially the same arguments before the state court as he made in the federal court in support of his federal claims. *Ibid.*

In rejecting the Ninth Circuit's approach, this Court did not characterize the question as whether Henry had fairly presented the *substance* of his federal claim to state court; rather, it cited *Picard* as requiring that *the federal claim* itself be fairly presented. The Court then stated:

> If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

513 U.S. at 365. The Court concluded that Henry had not satisfied this requirement because he "did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment." *Ibid.*

Three justices concurred in *Duncan* and one justice dissented. The concurring justices agreed that Henry had procedurally defaulted his federal claim because his claim in state court that there had been a "miscarriage of justice * * * was reasonably understood to raise a state-law issue of prejudice, not a federal issue of due process." *Id.* at 366–367 (Souter, J., concurring). The dissenting justice, however, was highly critical of the majority for "tightening the screws" on federal habeas exhaustion requirements and for adopting a "talismanic language" approach to resolving exhaustion/procedural default questions. *Id.* at 367–68. (Stevens, J., dissenting). The dissent argued that all *Picard* had required was that the "substance" of the federal claim be presented, that the Court had not before insisted that the prisoner "place the correct label on his claim, or even cite the Federal Con-

stitution." *Id.* at 367. The majority's departure from these precedents, in the dissent's view, was both "hypertechnical and unwise." *Id.* at 369.

Four years after *Duncan*, this Court extended the "fair presentment of federal claims" requirement to include review by the State's highest appellate court, even where that review is discretionary. In *O'Sullivan v. Boerckel*, 526 U.S. 838, 848–49 (1999), this Court held that "[b]ecause the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."

In his dissent in *O'Sullivan*, Justice Breyer recognized that a consequence of this requirement was that it would likely overburden state supreme courts with the filing of petitions seeking review of non-review-worthy cases. 526 U.S. at 863 (Breyer, J., dissenting). Justice Stevens' dissent also recognized the reality that, for most States with discretionary supreme court review, the intermediate court's resolution of the federal claim would, from the State's perspective, certainly be adequate to avoid comity concerns that inform the exhaustion/procedural default requirements. 526 U.S. at 859 (Stevens, J., dissenting) The dissent, therefore, would conclude, at least as to "fact-intensive claims that fail to present any issue of broad significance," that presenting those claims to the state's highest court is not required, at least where the state supreme court's discretionary review rules contemplate that the court would not accept review of those claims. *Ibid.*

In these two decisions, the Court has endeavored to impose clear, workable rules to guide lower courts in the exhaustion/procedural default arena. This Court has rejected more ambiguous rules, reflected in the dissenting opinions in *Duncan* and *O'Sullivan*, in the interests of achieving prompt and simple resolution of exhaustion/procedural default issues. In *Duncan*, the dissent favored a rule that the Court should require the habeas petitioner to present only "the substance of a federal habeas corpus claim * * * to state courts." 513 U.S. at 367 (Stevens, J., dissenting). Yet the rule adopted by the *Duncan* majority, although criticized by the dissent as "hypertechnical," clearly serves the important interest of speeding along resolution of federal habeas claims without imposing undue requirements on prisoners litigating in state court. A "bright line" test that requires the state prisoner litigant to explicitly state that he is raising a claim under the federal constitution makes for prompt and simple resolution of any exhaustion and procedural default claims. That is no small achievement, and hardly an unworthy goal, in federal habeas litigation.

Similarly, in *O'Sullivan*, this Court adopted the bright line requirement that, where discretionary review of federal claims is available in a State's highest court, state prisoner litigants must present their federal claims to that court to satisfy exhaustion/procedural default requirements. The majority rejected the dissent's preferred case-by-case approach in favor of a rule that would serve the States' interests in diminishing the volume of cases a

state supreme court would have to consider, while also serving the federal interest in avoiding the necessity of trial courts becoming embroiled in controversies that a case-by-case analysis would create.

Although this Court has attempted to clarify what a state prisoner must assert in state court to satisfy federal habeas exhaustion/procedural default requirements, that attempt has met with little success. As discussed in the next section, the tests employed by a majority of circuit courts have not changed since *Duncan*. The majority of courts still deem exhaustion/procedural default requirements satisfied so long as they can conclude that the "substance" of the federal claim was presented to the state court. And some circuits, including the Ninth Circuit, will look to state lower court filings and trial court opinions to determine whether a state prisoner's ambiguous claim raised in the State's highest court is, indeed, a federal claim. Only two circuits appear to heed *Duncan*'s admonition that state prisoners wishing to raise federal claims in state court must "say so."

II. The federal circuits apply varying and inconsistent tests in determining whether a state prisoner has "fairly presented" a federal claim in state courts.

Notwithstanding this Court's clear direction in *Duncan* and *O'Sullivan*, the federal circuits utilize varying tests to determine whether a state prisoner has "fairly presented" his federal claim in state court so as to avoid procedural default of that claim in federal habeas. Only one of those tests truely applies the requirement that the

state prisoner explicitly set forth his federal claim in the State's highest appellate court.

A. The "strict presentation" test

Only two circuits appear to recognize that, since *Duncan*, a state prisoner in state court must identify clearly his claim as a federal one to satisfy the "fair presentation" requirement. "Fair presentation" may be satisfied by including a reference to the federal constitution or an authority that has decided the claim on a federal basis. The following cases demonstrate that approach:

- *Baker v. Corcoran*, 220 F.3d 276 (4th Cir. 2000), *cert. denied*, 531 U.S. 1193 (2001) (concluding, citing *Duncan,* that prisoner's habeas claim that jury instruction violated federal law was not exhausted where prisoner, on direct appeal, neither cited nor referred to federal law);
- *Isaacs v. Head*, 300 F.3d 1232, 1254 (11th Cir. 2002) ("In light of *Duncan*, we agree with the district court that Isaacs did not 'fairly present' to the state court a [federal claim where no] federal cases were cited, and no language was used by Isaacs which would have alerted the Georgia Supreme Court to the fact that Isaacs was asserting a federal constitutional claim, separate and independent from his [state] claim.").[7]

[7] The Eleventh Circuit, before *Duncan*, applied the four-factor *Daye* test in analyzing exhaustion questions. *See Watson v. Dugger*, 945 F.2d 367, 370 (11th Cir. 1991). In its post-*Duncan* decision in

B. The "whole record review" test

The First, Fifth, and Ninth circuits do not confine their inquiry to the pleadings filed by the state prisoner in the State's highest appellate court, but will consider lower court filings and documents as well to determine if the federal claim was identified there. If, on review, the court can determine that the petitioner raised the federal claim somewhere in the State's lower courts, it may conclude that the State's highest appellate court was "alerted" to the federal nature of the state prisoner's claim on appeal. Cases that exemplify that approach include:

- *Barresi v. Maloney*, 296 F.3d 48, 52 (1st Cir. 2002) (court will consider "pleading and filings submitted by a habeas petitioner to lower state courts * * * [as] 'a backdrop against which his later filings [must] be viewed.'") (citation omitted);
- *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998) (in determining whether prisoner had presented the "substance of the federal habeas claim to the highest state court" court will review prisoner's "state habeas application" in the state trial court, including attachments to the application);

Isaacs, however, the court did not cite *Watson* nor employ the *Daye* test in concluding that the prisoner there had not exhausted his federal claim in state court. Thus, that circuit appears to have recognized the change required by *Duncan* and modified its test accordingly.

- *Reese v. Baldwin*, 282 F.3d 1184 (9th Cir. 2002) (state prisoner "alerted" state supreme court to federal nature of his claim, where it was clear that the state post-conviction trial court had resolved the claim below citing federal authority).

C. The "substance of the claim" test

The Second, Third, Seventh, and Eighth Circuits appear to confine their analysis to the pleadings filed by the state prisoner in the state's highest appellate court. Those courts, however, apply a multi-factored test that permits the court to determine that the state prisoner has exhausted his federal claim without specifically identifying in the highest appellate court a federal constitutional provision or an authority construing the federal constitution. Examples of cases in which this approach was used include:

- *Ramirez v. Attorney General*, 280 F.3d 87, 90, 94–95 (2nd Cir. 2001) (holding that state prisoner's "letter application to the New York Court of Appeals for leave to appeal was sufficiently specific under the test established in *Daye v. Attorney General*, 696 F.2d 186, 194 (2d Cir. 1982) (en banc) [*cert. denied*, 464 U.S. 1048 (1984)], to likely alert that Court to the federal nature of Ramirez's claim"; under *Daye* test, state prisoner "alerts" highest court to federal nature of claim without citing specific provision of federal constitution by "(a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state

cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, [or] (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation)";

- *McCandless v. Vaughn*, 172 F.3d 255, 261 (3rd Cir. 1999) (the *Daye* test sets forth "some of the ways in which petitioners may communicate that they are asserting a federal claim without explicitly referencing specific portions of the federal constitution or statutes");
- *Wilson v. Briley*, 243 F.3d 325, 327 (7th Cir. 2001) (applying *Daye* test);
- *Barrett v. Acevedo*, 143 F.3d 449, 453–54 (8th Cir. 1998), *on reh.*, 169 F.3d 1155 (8th Cir.) (en banc), *cert. denied*, 528 U.S. 846 (1999) (court states that "fair presentment" requires petitioner "to refer to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent constitutional issue" in the state court, while also stating that it is only the "substance of his federal claim that must be fairly presented to the state court.").

What appears most clearly to divide the circuits in their exhaustion analysis is the extent to which *Duncan* has had any impact on that analysis. Several circuits do not even cite *Duncan*, let alone acknowledge that *Duncan* intended to require more specificity in state-

court pleadings. *See, e.g., Barresi*; *Ramirez*, 280 F.3d at 94–95. Others cite *Duncan,* but continue to rely on pre-*Duncan* tests that avoid any requirement that federal claims be expressly identified, seeking instead simply to discern whether the "substance" of the federal claim was presented in state court. *See, e.g., McCandless*, 172 F.3d at 261; *Barrett*, 143 F.3d at 453. In stark contrast, two circuits do recognize that, after *Duncan*, an exhaustion analysis for federal habeas purposes is limited to determining whether the state prisoner expressly stated the federal claim in state court by relying on a provision or authority construing a provision of the federal constitution. *See, e.g., Isaacs*; *Baker*.

III. The federal courts that do not apply a strict test for the "fair presentation" requirement fail to give proper respect to the policy of federal-state comity that underlies the exhaustion requirement.

Not only are the courts divided in their approach to the exhaustion analysis, but the tests that permit exhaustion by some means other than explicitly presenting the federal claim to the state appellate courts implicate important state and federal interests. In the first place, those tests are based on an inaccurate assumption about the workings of many state appellate courts. Typically, those federal courts that have excused a state prisoner's failure to present his claims clearly as federal claims in the state courts have based their analysis on an assumption that the state courts would (or could), in any event, have viewed these claims as federal constitutional claims. That assumption lacks merit where, as in Oregon and many

other States, appellate courts have placed renewed emphasis on *state* constitutional law. *See, e.g., State v. Kennedy*, 295 Or. 260, 666 P.2d 1316 (1983) (court addresses claims of constitutional error first under the state constitution before proceeding, if at all, to the federal constitution). Even assuming that claims like those asserting "deprivation of the right to cross examine witnesses" and "ineffective assistance of counsel" fairly could be said to alert a court that a constitutional claim is being raised, those claims do not alert the court that the claim is one arising under the *federal* constitution.[8]

Moreover, a test that requires a clear presentation of the federal claim in the state courts serves important state and federal interests. In *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court explained the significant state interests involved as follows:

> This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims. * * * This exhaustion requirement is also grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights. As we explained in *Rose* [*v. Lundy*, 455 U.S. 509 (1982)]:

[8] Article I, section 11, of the Oregon Constitution, for example, also entitles a criminal defendant to adequate assistance of counsel. *See Krummacher v. Gierloff*, 290 Or. 867, 871-72, 627 P.2d 458, 461-62 (1981).

> "The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. * * * Under our federal system, the federal and state 'courts [are] equally bound to guard and protect rights secured by the Constitution.' * * * Because 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation,' federal courts apply the doctrine of comity, which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

(Citations omitted.)

In *Coleman*, the Court rejected a broad rule that "would greatly and unacceptably expand the risk that federal courts will review the federal claims of prisoners in custody pursuant to judgments resting on independent and adequate state grounds." 501 U.S. at 738. A primary reason for rejecting the proposed rule was that "it would place burdens on the States and state courts in exchange for very little benefit to the federal courts." *Ibid.* The Court recognized the burden federal habeas review places on the State, including the burden of responding to

the federal habeas claim, "the uncertainty and delay added to the [State's] enforcement of its criminal laws," and the cost of retrying the petition if the federal court reverses a conviction. *Id.* at 739. Finally, the Court recognized the important state interest in finality and the need for consistency "between the respect federal courts show for state procedural rules and the respect they show for their own." *Id.* at 751.

All of those interests are at issue in this case as much as in cases involving procedural default based on state court opinions that rest on independent and adequate state grounds. States are burdened as much by rules that excuse a habeas petitioner's failure to expressly present his federal claim first in the state courts as they are by the loose application of the presumption addressed in *Coleman.* A strict definition of what satisfies the "fair presentation" requirement similarly avoids bogging down federal courts in time-consuming and resource-draining procedural questions that serve only to further delay final resolution of prisoner litigation and fail to properly respect the role of the state appellate courts in resolving federal claims. In addition, a strict definition eliminates the uncertainty and inconsistency in results that plague federal habeas litigation not only between circuits, but even within circuits. *Compare, e.g., Barrett v. Acevedo* (prisoner exhausted Sixth Amendment Confrontation Clause claim in state court by challenging his lack of opportunity for cross-examination), *with Ashker v. Leapley*, 5 F.3d 1178 (8th Cir. 1993) (Confrontation Clause claim not exhausted in state court when prisoner argued that the introduction of hearsay evidence deprived him of a fair trial under the Fourteenth Amendment). As explained

below, this case presents an opportunity for this Court to reaffirm the principles it expressed in *Duncan, O'Sullivan,* and *Coleman* and provide a clear rule for when the "fair presentation" requirement is satisfied.

IV. The Ninth Circuit's decision provides the Court with an opportunity to clarify the proper test federal courts are to use in addressing exhaustion/procedural default questions.

In this case, the Ninth Circuit held that a federal habeas petitioner had fairly presented his federal claim of ineffective assistance of counsel—even though he mentioned his claim only once and only in his amended petition for post-conviction relief filed in the state trial court—because the trial court's written opinion cited federal authority in rejecting his claim. The Ninth Circuit deemed it insignificant for exhaustion purposes that the habeas petitioner, in both the state court of appeals and the state supreme court, had merely alleged that he had been denied effective assistance of appellate counsel, without indicating, by citation to a specific federal constitutional provision or any authority construing the federal constitution, that his claim was a federal one. Nor did he present any argument before either appellate court that could have alerted those courts to the federal nature of his claim.

Moreover, the Ninth Circuit misanalyzed this Court's recent cases addressing exhaustion/procedural default questions in other respects. Not only did the Ninth Circuit improperly consider documents other than those filed by the petitioner in the State's highest appellate court, more importantly it focused on the wrong ques-

tion. The question determinative to the Ninth Circuit was whether the state appellate courts had the bare opportunity to address Reese's claim as a federal one. Because the state appellate courts had that opportunity, regardless of what Reese included in his briefs, the Ninth Circuit concluded that Reese had fairly presented his claim to those courts. The Ninth Circuit explained:

> Comity requires only that we not rule if the state court has not had the *opportunity* first to hear federal habeas claims. Where opportunity existed, comity is not offended by an opportunity that the state foregoes.
>
> Here, we conclude that the Oregon Supreme Court had that opportunity. A state supreme court certainly has the opportunity to read a petition for review *and* the lower court decision claimed to be in error before deciding whether to grant discretionary review. It is in this sense that we presume the Oregon Supreme Court read Reese's PCR court opinion. But assuming *arguendo* that the Oregon Supreme Court chooses not to read lower court opinions when deciding whether to grant review, it would not control our exhaustion analysis. For in that assumed case, that court has chosen not to take advantage of an opportunity provided, and the interests of comity are no longer at issue.

App-18 to App-19 (emphasis in original). What the Ninth Circuit has done is to reject the requirement that state appellate courts be provided with an opportunity to consider a federal claim before it can be raised in federal habeas, and instead to require only that state courts have

some ability to find the federal claim for themselves in the first instance.

As the dissent below properly noted, state appellate court "judges are not like pigs hunting for truffles buried in briefs." App-20 (citation and internal quotation marks omitted). Nor worse, buried in the record. Nor is it enough that they have the bare opportunity to address a claim as a federal one in that they can first identify that claim without any assistance from the state prisoner litigant. This Court has attempted to create a clear standard that enables exhaustion/procedural default questions to be answered by federal trial courts with minimal devotion of time or resources, while imposing little burden on state prisoners seeking federal habeas relief. But the burden properly rests on the state prisoner litigant to fairly present the federal claim to the state appellate court and to provide that court with the opportunity to address the claim by offering a clear indication that a federal claim is being raised.

This case thus presents the Court with the opportunity to clarify a question that plagues and divides the federal circuits. The resolution of that question will markedly affect the analysis that at least a majority of federal courts will employ in resolving exhaustion questions. Assuming the State is correct that *Duncan* did intend to "tighten the pleading screws," or that, even if it did not, those screws should be tightened, the analysis of exhaustion questions in the lower courts will be simple and expedient and will produce consistent results among the circuits. None of that is occurring at present, as an examination of the cases the State has cited in this petition will readily reveal. Imposing heightened pleading requirements on state prisoners is a small price to pay for

improved efficiency, increased economy, and respect for comity in federal habeas litigation.

CONCLUSION

For the reasons discussed above, the State respectfully requests that this Court grant the petition for writ of certiorari and reverse the decision of the court below.

Respectfully submitted,

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December 2, 2002

APPENDIX A

Michael REESE, Petitioner-Appellant,
v.
George H. BALDWIN, Respondent-Appellee

No. 01-35153

United States Court of Appeals, Ninth Circuit

Argued and Submitted Nov.9, 2001

Filed March 12, 2002.

Dennis N. Balske, Assistant Federal Public Defender, Portland, OR, for the petitioner-appellant.

Robert B. Rocklin, Assistant Attorney General, Salem, OR, for the respondent-appellee.

Appeal from the United States District Court for the District of Oregon James A. Redden, District Judge, Presiding. D.C. No. CV-98-00851-ST.

Before: HUG, T.G. NELSON, and GOULD, Circuit Judges.

Opinion by Judge GOULD; Dissent by Judge T.G. NELSON.

GOULD, Circuit Judge:

OVERVIEW

Petitioner Michael Reese ("Reese") appeals the district court ruling that his claim of ineffective assistance of appellate counsel in his § 2254 habeas petition is procedurally defaulted because of lack of exhaustion. The

issue is whether Reese adequately alerted the state courts to the federal nature of his claims. We reverse the district court, concluding that Reese fairly presented his federal claims to the state courts, and we remand for further proceedings on his habeas petition.

PROCEDURAL HISTORY

I. Conviction and Direct Appeals

The story pertinent to this habeas appeal begins when Reese was convicted on two counts of kidnaping and one count of attempted sodomy in Oregon state court. The trial court sentenced Reese as a dangerous offender. This allowed the court to depart from the usual sentencing guidelines. The court issued a determinate sentence of thirty years on the kidnaping counts. That meant that Reese would have to serve the entire thirty years without eligibility for parole. The court also sentenced Reese to three years on the attempted sodomy count, a determinate sentence to be served consecutively to the one on the kidnaping counts. Facing a thirty-three year sentence with no possibility of parole, Reese thus far had not fared well.

The Oregon Court of Appeals affirmed the convictions. But it remanded for resentencing because Oregon law required the sentencing court to indicate what the presumptive sentence would have been had Reese not been sentenced as a dangerous offender, which the trial court hadn't done. Under Oregon law, Reese could have been eligible for parole after he served the presumptive term, and so this omission had potential impact on Reese's tenure as a convict.

On this first remand the court again sentenced Reese to thirty years on the kidnaping counts as a dangerous offender. And this time the court also specified the presumptive sentence that the court would have imposed if it had not found Reese to be a dangerous offender. However, as grist for the mill of further appeals, this presumptive sentence specified by the court was also a departure from the sentencing guidelines. Stated differently, the sentence that the court said it would have issued absent departure from the sentencing guidelines for a dangerous offender was itself also a departure from the sentencing guidelines. Again, Reese had not fared well.

But this use of a departure for the presumptive sentence was not permissible under Oregon law, and the Oregon Court of Appeals again remanded for resentencing. The appeals court noted that the correct presumptive sentence under the guidelines without departure should have been between 121 and 130 months. *See State v. Reese*, 876 P.2d 317, 319 (Or. Ct. App. 1994).

On the third sentencing after the second remand, the Oregon sentencing court appointed different counsel to represent Reese. Reese then objected to the new attorney and proceeded pro se. This time, facing the pro se Reese alone, the trial court did not sentence Reese as a dangerous offender. Instead, the court sentenced Reese to 260 months on the kidnaping convictions, plus the three year consecutive term for attempted sodomy. The length of the kidnaping sentence was a departure from the guidelines, though not for being a dangerous offender. Yet another time, Reese had not fared well. The Court of Appeals on the second appeal had stated that Reese when sentenced as a dangerous offender could be eligible for

parole after 11 years, the presumptive term. But on remand, in the third sentencing, the court abandoned dangerous offender status as the basis for departure, and departed on other grounds.

Reese appealed his sentence again for the third time and was appointed still another counsel. But Reese's appeal proceeded under an ill star. Reese's appellate counsel declined to champion Reese's position and filed a *Balfour* brief with the Oregon Court of Appeals suggesting that the appellate issues had no merit. The *Balfour* system is Oregon's version of the *Anders* briefing system announced in *Anders v. California*, 386 U.S. 738 (1967), through which appointed counsel present claims they conclude are frivolous.[1] The Oregon Court of Appeals on this third appeal affirmed Reese's sentence without written opinion. *See State v. Reese*, 894 P.2d 1268 (Or. Ct. App. 1995). Reese did not seek review by the Oregon Supreme Court. Thus ends the saga of Reese's direct appeal.

II. Post-Conviction Review

[1] Under the *Balfour* system, counsel files a brief notifying the court that counsel fees the appeal lacks merit. Counsel writes and signs Part A of the brief, which gives a statement of facts and procedural history. Counsel includes any issues that the appellant wishes to raise in Part B of the brief, which is signed by the appellant. Contrary to the system announced in *Anders*, Oregon's system does not require counsel to withdraw. Instead, counsel remains on hand to help the appellant with any issues appellant might want to raise. Additionally, unlike in *Anders*, an Oregon court presented with a *Balfour* brief does not engage in its own independent review of the entire record. *See State v. Balfour*, 814 P.2d 1069 (Or. 1991).

As is typical in Oregon, however, that was not the end of the matter. Reese filed a pro se petition for state post conviction relief ("PCR"). As it turns out, the tale of Reese's PCR process is the part of the state court proceedings that is most pertinent for our purposes in this appeal. The PCR court appointed still another new counsel for Reese. Counsel filed an amended petition raising a claim of ineffective assistance of appellate counsel, citing explicitly to the Sixth and Fourteenth Amendments of the federal constitution as well as to the Oregon constitution.[2] The PCR court denied the ineffective assistance of appellate counsel claim with a terse ruling, citing federal law authority. In its Memorandum of Opinion, beneath a heading "Adequate Appellate Counsel,"

[2] The amended petition stated:

> Petitioner was denied adequate assistance of appellate counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States and under Article I, Section 11, of the Constitution of Oregon, in that counsel on appeal failed to:
>
> a. Withdraw as attorney for Petitioner due to conflict of interest in that her husband . . . had been the attorney for prosecution three times on Petitioner's cases;
>
> b. Notify Petitioner in advance when she removed Petitioner's attorney David Allen, from Petitioner's case and became the attorney of record for Petitioner without Petitioner's consent;
>
> c. Raise issues that had been preserved for appeal;
>
> d. File a timely Notice of Appeal;
>
> e. Obtain trial transcripts in a timely manner and in order to provide a thorough and proper appeal.

the court simply wrote, "Appellate counsel need not present every colorable issue. *Jones v. Barnes*, 463 U.S. 745 (1983)."[3] Reese again appealed, now in the PCR process.

Reese was appointed again still another counsel for the PCR appeal in the Oregon Court of Appeals. Reese's PCR appellate counsel filed a *Balfour* brief stating there were no meritorious claims, just as Reese's direct appeal counsel had done. For Part B of the *Balfour* brief, the section presenting the claims that counsel thought frivolous, counsel inexplicably attached Reese's pro se PCR petition rather than the amended petition that had been prepared by an attorney. As a result, the *Balfour* brief did not explicitly cite to federal authority for the ineffective assistance of appellate counsel claim, as the amended petition had done. The state filed a motion for summary affirmance, which Reese's attorney did not oppose. The Oregon Court of Appeals granted the motion, and summarily affirmed the PCR court's decision without a written opinion.[4]

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[3] Just above the court's decision on the appellate counsel claim was a separate heading entitled "Adequate Assistance of Counsel". Under that heading, another terse ruling stated, "Petitioner received adequate assistance of trial counsel," and cited *Strickland v. Washington*, 466 U.S. 668 (1984), the leading federal precedent establishing the standard for ineffective assistance of counsel under the Sixth Amendment, as well as citing "*Krummacher v. Gierloff*, 290 Or. 867 (1981)," an Oregon case analyzing ineffective assistance of counsel claims under both the federal and Oregon constitutions. *See Krummacher*, 627 P.2d 458, 461.

[4] The Court of Appeals issued an order granting the motion for summary affirmance and affirming the PCR court's decision:

> "Respondent has moved for summary affirmance pursuant to ORS 138.660 on the ground that this appeal presents no substantial question of law. Appellant has not opposed the motion. The motion is granted.
>
> "Affirmed."

Reese next filed a petition for review in the Oregon Supreme Court. This petition cited to the Sixth and Fourteenth Amendments of the federal constitution, but the citations appeared to support claims for ineffective assistance of trial counsel only. The sentence containing these citations stated, "Moreover, since Petitioner asserts he was coerced and threatened by counsel to waive his right to trial by jury, Petitioner believes his 5th, 6th and 14th amendment rights have been violated." Reese's claim alleging ineffective assistance of counsel on direct appeal was made summarily, along with many other claims. The petition contained no express citation to federal authority for the claim.[5] The Oregon Supreme Court denied review.

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[5] For convenience, we set fourth relevant parts of the petition, including the full argument section of the petition:

> **Statement of reasons for reversal of Court of Appeals**
>
> The decision of the Court of Appeals should be reversed for the following reason: Petitioner was subject to several errors with respect to this case, including improper sentencing, ineffective assistance of both trial court and appellate court counsel, prosecutorial misconduct, improper waiver of jury and improper investigation.
>
> **Statement of Facts**
>
> . . . Petitioner alleges trial court errors related to sentencing, in that the Petitioner received an unlawful dangerous offender sentence. Moreover, Petitioner alleges claims of error with respect to improper waiver of a jury

III. Federal Habeas

With the past state court stage thus set, Reese filed in federal court a habeas petition and later an amended habeas petition alleging, among other claims, ineffective assistance of counsel on direct appeal. The case was referred to a federal magistrate judge, who in turn recommended finding that Reese fairly presented his claim of ineffective assistance of appellate counsel. The magistrate judge recommended granting relief for that claim and denying relief for Reese's other claims.[6] The district court rejected the magistrate judge's recommendation, held that Reese did not fairly present this claim of ineffective appellate counsel to the Oregon Court of Appeals, and held that the claim was procedurally defaulted.[7] The district court denied Reese's other claims, and rejected Reese's motion for reconsideration. Reese appeals the dismissal of his habeas petition.

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trial, failure to provide a fair and impartial trial, improper resentencing, inadequate assistance of counsel, inadequate investigation and inadequate appellate counsel.

Argument

The sentence levied upon the petitioner is improper in that Petition was subject to several errors with respect to this case, including improper sentencing, ineffective assistance of counsel, prosecutorial misconduct, improper waiver of jury and improper investigation.

Petitioner asserts that his imprisonment is in violation of ORS 138.530. Petitioner alleges that the sentence violates his eighth amendment rights against cruel and unusual punishment. Moreover, since Petitioner asserts he was coerced and threatened by counsel to waive his right to trial by jury, Petitioner believes his 5th, 6th, and 14th, amendment rights have been violated.

[6] The magistrate judge would have granted relief because she would have held Oregon's *Balfour* system unconstitutional. Because we find only that Reese exhausted his claim of ineffective assistance of appellate counsel, we do not have occasion to rule on the constitutionality of the *Balfour* system.

DISCUSSION

We review only the district court's determination that Reese procedurally defaulted his ineffective assistance of appellate counsel claim.[8]

I. Standard of Review

The district court's dismissal of a 28 U.S.C. § 2254 habeas claim on the ground of procedural default presents issues of law that we review de novo. *See La Crosse v. Kernan*, 244 F.3d 702, 704 (9th Cir. 2001).

II. Exhaustion

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[7] The district court based its decision on our recent opinion in *Lyons v. Crawford*, 232 F.3d 666 (9th Cir. 2000). In *Lyons* we held that strict rules for fair presentation to state courts applied to pro se petitioners. *See Lyons*, 232 F.3d at 669.

[8] Accordingly, we do not now have occasion to review the merits of the ineffective assistance of appellate counsel claim or any other claims contained in Reese's habeas petition. If there was procedural default, a defaulted claim could be considered only with a showing of cause and prejudice, or a showing that refusing to hear the claim would result in a "fundamental miscarriage of justice." *See Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991). No serious contention of cause can be made here, since Reese had no right to counsel on his PCR appeals. *See Ellis v. Armenakis*, 222 F.3d 627, 633 (9th Cir. 2000). Reese does not argue that a fundamental miscarriage of justice would result from a procedural default.

A state prisoner must exhaust available state court remedies on direct appeal or through collateral proceedings before a federal court may consider granting habeas corpus relief. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992). Exhaustion is required by statute. *See* 28 U.S.C. § 2254(b)(1)(A). "To satisfy the exhaustion requirement of § 2254, habeas petitioners must fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and to correct alleged violations of its prisoners' 'federal rights.'" *Lyons v. Crawford*, 232 F.3d 666, 668 (2000), *as modified by* 247 F.3d 904 (9th Cir. 2001) (quoting *Duncan v. Henry*, 513 U.S. 364, 365 (1995)).

The exhaustion requirement has long been rooted in our commitment to federalism, *see Ex Parte Royall*, 117 U.S. 241, 251 52 (1886), and it goes hand in hand with our respect for state court processes. State courts, like federal courts, may enforce rights under the federal constitution. *See Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990).

If a habeas petitioner fails to exhaust a claim, it may be procedurally defaulted. A claim is procedurally defaulted "if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1 (1991); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 848-49 (1999); *Francis v. Rison*, 894 F.2d 353, 354 (9th Cir. 1990). If Reese did not fairly present his claims to the Oregon courts, he procedurally defaulted them, because he is now barred by Oregon's time limits from

going back and trying again to exhaust them. *See* Or. Rev. Stat. § 138.071 (2001).

A. Scope of *Lyons*

Lyons carefully addressed and established helpful guidelines for assessing whether a federal claim was fairly presented in the state court. As we explained, "[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available state remedies only if he characterized the claims he raised in state proceedings specifically as federal claims." *Lyons*, 232 F.3d at 670 (emphasis original). "In short, the petitioner must have either referenced specific provisions of the federal constitution or statutes or cited to federal case law." *Id. Lyons* also makes clear that the specific allegation cannot be an implied one; there must be explicit reference to federal law. As we held in *Lyons*, "[A] federal claim has not been exhausted in state court unless the petitioner both raised the claim in state court and explicitly indicated then that the claim was a federal one . . ." *Id.* at 669 (emphasis original).

The parties agree that Reese complied with *Lyons* at the PCR court, but the state argues that Reese did not satisfy *Lyons* at the Oregon Court of Appeals and the Oregon Supreme Court. So we must decide whether a habeas petitioner must comply with *Lyons* at every level of a state court system or if complying at one level — the PCR court — is enough.

In assessing the scope of the *Lyons* rule, it is noteworthy that in *Lyons*, the petitioner never cited to federal authority for his claims at any level of the state courts. *See id.* at 667. The state courts in *Lyons* never were

alerted to any explicitly federal issue. In contrast, it cannot be denied that Reese explicitly alerted the PCR court to his federal claim. *See supra*, n. 2. In addition, the PCR court decided the claim based on federal case law, first citing *Strickland* on the general issue of effective assistance at trial, and then *Jones v. Barnes* on effective assistance on appeal. *See supra*, n. 3 and accompanying text. And so we must address whether the *Lyons* requirement for fair presentation is met by an explicit assertion of a federal law violation at the PCR court level alone, or whether *Lyons* requires some level of explicit assertion at later stages of the state appellate process.

To exhaust a claim in the state courts, a habeas petitioner must, in addition to complying with *Lyons*, present that claim to the state's highest court, even if that court has discretionary control over its docket. *See O'Sullivan*, 526 U.S. at 845. If *Lyons* was intended only to ensure that the state has some chance to address a federal issue before the federal courts do so, then it might be satisfied by explicitly citing federal law once, to a lower-level court such as the PCR court. However, we reject that view. *Lyons* is properly read as part and parcel of exhaustion law. It is thus apparent that *Lyons's* requirement of explicitly presenting a federal claim must be satisfied at the highest levels of the state court system to ensure that possibilities of the state courts resolving federal issues relating to state prisoners have been truly exhausted.[9] A request to a lower court alone is not sufficient to exhaust prospects of state court relief on a fed-

[9] To exhaust is defined as "To use up completely (either a material or immaterial thing); to expend the whole of; to consume entirely." Oxford English Dictionary, Second Edition, 1989.

eral claim. To exhaust requires that the highest state court must be alerted to the specifically federal nature of the claim presented.

The United States Supreme Court has said that a habeas petitioner must give the state courts "one full opportunity" to decide a federal claim by carrying out "one complete round" of the state's appellate process in order to properly exhaust a claim. *O'Sullivan*, 526 U.S. at 845. *Lyons* held that a petitioner can exhaust a claim only by both raising the claim and explicitly indicating the claim is a federal one. *Lyons*, 232 F.3d at 669. The federalism policies underlying exhaustion and the concerns that underlie *Lyons* argue persuasively that explicitness is necessary not merely at any one state court level, but instead at the highest state court that hears such claims. Following and clarifying *Lyons*, we hold that a habeas petitioner must indicate to the state's highest court the specifically federal nature of a claim in order to exhaust it. Accordingly, presenting a federal claim explicitly at the PCR court in itself is not sufficient for exhaustion.

Rather, with this understanding of *Lyons*, the issue becomes whether Reese alerted the Oregon Supreme Court to the federal nature of his claim of ineffective assistance of appellate counsel. Because of Oregon's rules of appellate procedure, to resolve this issue we must address two distinct questions: (1) Was the federal nature of Reese's claim properly raised to the Oregon Court of Appeals; and (2) Did Reese also comply with *Lyons* at the Oregon Supreme Court?

B. Oregon Court of Appeals

Under Oregon law, claims may not be presented in a petition for review to the Oregon Supreme Court unless they are first raised in front of the Oregon Court of Appeals. *See* Or. R. App. P. 9.20(2); *State v. Castrejon*, 856 P.2d 616, 621-22 (Or. 1993). We must therefore determine whether Reese fairly presented his claim to the Oregon Court of Appeals before deciding that he fairly presented his claim to the Oregon Supreme Court. For if the federal claim was not presented to the Oregon Court of Appeals, the Oregon Supreme Court need not have considered that federal claim no matter how explicitly raised to it.

Here, Reese's brief to the appeals court lacked federal citations, but that is not dispositive of the issue under the unusual facts of this case. *Lyons* requires that a state court be explicitly alerted to the federal nature of a claim. But it does not necessarily require that federal citations be included in an opening brief or petition for review when a claim is expressly asserted and the federal nature of that claim is explicit from the face of the decision under review.

The PCR decision Reese was appealing, which the Oregon Court of Appeals affirmed without further reasoning, did explicitly cite federal law — *Strickland* and *Jones v. Barnes* — to support the denial of Reese's ineffective assistance claims. Oregon law requires the PCR court to "state clearly the grounds upon which the cause was determined, and whether a state or federal question, or both, was presented and decided." Or. Rev. Stat. § 138.640 (1999). Given that there is no other statement from the PCR court on the federal versus state nature of

Reese's claim, the citations to *Strickland* and to *Jones v. Barnes* in the PCR court's decision "state clearly" to any who read the decision that Reese presented a federal question and that the PCR court decided it on federal grounds.

Even though Reese's brief to the Oregon Court of Appeals did not cite federal authority on the issues now raised on federal habeas, Oregon's clear statement requirement and the PCR court's citations to *Strickland* and *Jones v. Barnes* placed the Oregon Court of Appeals on notice that it was reviewing a federal question that the PCR court decided on explicit federal grounds. So long as the Oregon Court of Appeals read the lower court's decision, it would have seen that Reese was raising a federal issue. Whatever else a state reviewing court might do, we are confident, as a ground of our decision, that the state reviewing court reads the decision it is reviewing before summarily affirming that decision.

To summarize our views: Reese raised the ineffective assistance of appellate counsel claim and cited federal authority in his petition to the PCR court. The PCR court cited only federal law in deciding the issue, and under Oregon law this means the claim was decided on federal grounds. Reese included the claim in his brief to the Oregon Court of Appeals, and the Oregon Court of Appeals summarily affirmed the PCR court's decision, which had been made on the basis of federal law. Based on these factors, we hold that the Oregon Court of Appeals "surely [was] alerted to the fact that [Reese was] asserting claims under the United States Constitution." *Duncan*, 513 U.S. at 365-66.

C. Oregon Supreme Court

Because Reese presented the federal claim to the Oregon Court of Appeals, the Oregon Supreme Court in turn could review the claim if properly presented to the Oregon Supreme Court itself. The final and dispositive issue is thus whether Reese satisfied *Lyons* and fairly presented his claims at the Oregon Supreme Court. Reese cited the federal constitution in the argument section of his Oregon Supreme Court petition, but did so explicitly to support only claims other than ineffective assistance of appellate counsel. Here is the part of Reese's petition offering federal authority: "Moreover, since Petitioner asserts he was coerced and threatened by counsel to waive his right to trial by jury, Petitioner believes his 5th, 6th and 14th amendment rights have been violated."

A difficulty for Reese is that this sentence offers citations to support only those claims involving trial counsel, not appellate counsel. The rule is settled that citation to federal authority for one claim in a habeas petition is not transferred to all the other claims contained in the petition. *See Lyons*, 232 F.3d at 669-70. To fairly present a federal habeas claim to a state court, it is essential that the petitioner must in some way provide a reference to federal authority to support that particular claim. *See id.*

However, we reach here a firm and unmistakable conclusion that Reese nonetheless fairly presented his federal claim asserting ineffective appellate counsel to the Oregon Supreme Court. As we explained in our discussion of the review by the Oregon Court of Appeals, simply by reading the PCR court decision, the Oregon Supreme Court would have been alerted that the claim

for ineffective assistance of appellate counsel was decided and affirmed on the basis of federal law.

The question then is whether we should presume that the Oregon Supreme Court read the PCR court decision, which explicitly cited federal law. If the Oregon Court of Appeals had rendered a reasoned, substantive decision, it might be argued that we should presume only that a state supreme court would read the decision that it is asked to review — in this case, the Oregon Court of Appeals decision. But here, the Oregon Court of Appeals had granted a summary affirmance and did not speak to the merits except by affirming what the PCR court had said. We conclude that it is appropriate to presume that, when faced with a summary affirmance from the Oregon Court of Appeals, the Oregon Supreme Court would have read the PCR court's substantive decision. Any other conclusion would not do credit to the appellate review process. For whatever variations may be appropriate under discretionary state procedures, an appellate court cannot fairly review a decision without knowing its content.

Perhaps it might be argued to the contrary that the Oregon Supreme Court, having only discretionary jurisdiction, need not read the underlying court opinion before deciding whether to accept an appeal. The Oregon Supreme Court might decide a petition for review, the argument runs, based on what is in the petition and ponder the underlying opinion only if and after discretionary review is granted. Whatever the practical concerns underlying such a position, we reject it in principle. For even if review is discretionary, there is no way for the Oregon Supreme Court to exercise an informed discretion about accepting appeal unless it considers the con-

tent of the decision under review. A discretionary review is still to be a rational review.

But we need not go so far as to hold that a rational discretionary review process must always include some review of the underlying decision. For even if a state supreme court could rationally and fairly decide whether to grant review without reading the underlying opinion, it does not follow that a claim must be visible from the face of the underlying petition alone to be "fairly presented" for our purposes in assessing exhaustion. The United States Supreme Court has explicitly explained that proper exhaustion requires a habeas petitioner to give the State "a fair opportunity to pass upon [his claims]." *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000) (emphasis and internal quotations omitted). *See also Lyons*, 232. F.3d at 668 ("To satisfy the exhaustion requirement of § 2254, habeas petitioners must 'fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and to correct alleged violations of its prisoners' federal rights.'" (quoting *Duncan*, 513 U.S. at 365)). Comity requires only that we not rule if the state court has not had the opportunity first to hear federal habeas claims. Where opportunity existed, comity is not offended by an opportunity that the state foregoes.

Here, we conclude that the Oregon Supreme Court had that opportunity. A state supreme court certainly has the opportunity to read a petition for review and the lower court decision claimed to be in error before deciding whether to grant discretionary review. It is in this sense that we presume the Oregon Supreme Court read Reese's PCR court opinion. But assuming *arguendo* that the Oregon Supreme Court chooses not to read lower

court opinions when deciding whether to grant review, it would not control our exhaustion analysis. For in that assumed case, that court has chosen not to take advantage of an opportunity provided, and the interests of comity are no longer at issue.

Here, in summary, the PCR court decided the claim on the basis of federal law; Oregon's procedural rules put the reviewing courts on notice that the PCR court decision was required to state clearly its ground for decision; any review of the PCR court decision would have disclosed its federal law basis; and the Oregon Court of Appeals issued only a summary affirmance of the PCR court's decision. Under these circumstances, it must be presumed that, before deciding to deny discretionary review, the Oregon Supreme Court reviewed the PCR court decision that should have alerted the court to the federal nature of Reese's claim.

The Oregon Supreme Court was thus on notice of the specifically federal nature of Reese's claim of ineffective assistance of appellate counsel. We hold that Reese fairly presented his federal claim of ineffective assistance of appellate counsel to the Oregon Supreme Court and exhausted it.

CONCLUSION

We reverse the district court's dismissal of the claim of ineffective assistance of appellate counsel. We remand for further proceedings on that issue.[10]

REVERSED AND REMANDED.

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[10] We express no opinion on the merits of Reese's claim.

T.G. NELSON, Circuit Judge, dissenting:

I must respectfully dissent. I would affirm the district court on the ground that Reese procedurally defaulted his claim for ineffective assistance of appellate counsel by failing fairly to present it to the Oregon Supreme Court.

"Judges are not like pigs, hunting for truffles buried in briefs."[1] At least federal appellate judges are not, according to our precedent.[2] Yet the majority would hold state supreme court justices to a different standard — requiring them to root through the record for rare truffles of legal support that may complete an incompletely raised claim in one of the thousands of petitions they must decide whether to grant every year. And if they choose not to engage in this porcine behavior, they have, according the majority, chosen not to "take the opportunity" presented to them by a petitioner to review that petitioner's claim. The majority so holds despite clear and binding precedent regarding what constitutes fair presentation and despite clear Oregon procedural rules.

In order fairly to present a federal claim to state courts, a petitioner must "include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief."[3] Thus, fair presentation requires the assertion of the facts and the law supporting each claim.

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[1] *Entertainment Research Group. Inc. v. Genesis Creative Group, Inc.* 122 F.3d 1211, 1217 (9th Cir. 1997) (internal quotation marks and citation omitted).

[2] *See, e.g., id.*

[3] *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996).

The majority concludes, and I agree, that fair presentation must occur at every level of the state post-conviction review process. Thus, we agree that Reese was required to present both the factual and legal support for his claim of ineffective assistance of appellate counsel in his petition for review before the Oregon Supreme Court. We disagree, however, on whether he did so.

Reese did not cite any federal basis for his claim of ineffective assistance of counsel before the Oregon Supreme Court. Thus, in my opinion, he failed fairly to present the claim to that court. The majority holds, however, that the fact that the first postconviction court cited federal cases in its rejection of the claim miraculously saves that claim from procedural default. The Oregon Supreme Court could have sifted through the record in Reese's case, the majority reasons, to find the legal support missing from the claim in his petition. Thus, Reese fairly presented his claim to the Oregon Supreme Court in the majority's opinion. To me, that is not fair presentation.

There are good reasons for requiring the citation of facts and law supporting a claim in order to deem it fairly presented and exhausted.[4] For one thing, too many petitions for review are presented to state courts[5] to expect judges and law clerks to search through the record to find support for a claim that is not presented. Departing from the requirements of fair presentation thus renders hollow

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[4] *See, e.g., Gray*, 518 U.S. at 162,; *Shumway*, 223 F.3d at 987.

[5] In 1998, 8,627 petitions for review were filed for state supreme court review in California; 1,366 in Arizona; 1,146 in Washington; and 962 in Oregon. *See* State Court Caseload Statistics, 1998, National Center for State Courts (1999).

our professed interest in providing state supreme courts with an opportunity to review federal claims. Practically, they will have no such opportunity if they are required to search the record each time an incompletely supported claim appears before them.

Oregon procedural rules governing the presentation of petitions for review to the Oregon Supreme Court also require presentation of the legal support for every claim in a petition. Oregon Rule of Appellate Procedure 9.05(3) requires that the petition contain:

> (a) A prayer for review.
>
> (b) Concise statements of the legal question or questions presented on review and of the rule of law that petitioner proposes be established, if review is allowed.
>
> (c) A concise statement of each reason asserted for reversal or modification of the decision of the Court of Appeals, including appropriate authorities.
>
> (d) A short statement of facts relevant to the appeal, but facts correctly stated in the opinion of the Court of Appeals should not be restated.
>
> (e) A brief argument related to each reason asserted for review, if desired.
>
> (f) A statement of specific reasons why the issues presented have importance beyond the particular case and require decision by the Supreme Court.

> (g) A copy of the decision of the Court of Appeals, including the court's opinion and any concurring and dissenting opinions.[6]

Thus, Oregon procedural rules also require the presentation of legal support for a claim in every petition for review.

Worthy of note is the fact that the rules also require that the court of appeals' decision accompany a petition but do not require the lower court's decision to accompany the petition. This makes sense — after all, the Oregon Supreme Court will be reviewing the decision of the court immediately below if it decides to grant the petition for review. This rule undermines the assumption of the majority in this case, however, that the Oregon Supreme Court will naturally look to the trial court's decision when deciding whether to grant a petition for review. The rule does not even require that the trial court opinion accompany the petition.

By dissenting, I do not mean to diminish the disturbing history of this case. The parade of lawyers assigned to Reese and the mistakes made in his representation are an embarrassment. However, the unfortunate history of this case does not merit the creation of an odd and unreasonable exception to the rules of fair presentation. There are good reasons for those rules. The old adage "hard cases make bad law" seems to apply here. I dissent.

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[6] Or. R.App. P. 9.05(3).

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MICHAEL REESE,
Petitioner,

vs.

GEORGE H. BALDWIN,
Respondent.

CV98-851-ST
OPINION AND ORDER

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REDDEN, Judge:

Magistrate Judge Stewart filed her amended findings and recommendation on June 8, 2000. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). Decisions on dispositive issues under 28

U.S.C. § 636(b)(1)(B) are reviewed de novo. United States v. Raddatz, 447 U.S. 667, 673 (1980); Bhan v. NME Hospitals, Inc. 929 F.2d 1404, 1414 (9th Cir. 1991). When a party objects to any portion of the magistrate's findings and recommendation, the district court must make a de novo determination of that portion of the magistrate's findings and recommendation. 28 U.S.C. § 636(b)(1)(B); McDonnell Douglas Corp. v. Commodore Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982); United States v. Remsing, 874 F.2d 614 (9th Cir 1989).

Respondent has timely filed objections to the amended findings and recommendation. Oral argument on respondent's objections was held on September 14, 2000. Respondent's supplemental brief on the issue of retroactivity was filed September 26, 2000, and petitioner's reply was filed on September 27, 2000. I have given the file of this case a de novo review.

A. Magistrate Judge's Findings and Reommendation.

In his amended petition, petitioner raised four grounds for relief: (1) ineffective assistance of trial counsel; (2) no knowing or voluntary waiver of right to counsel at his second resentencing; (3) vindictive sentences imposed at his second resentencing; and (4) ineffective assistance of appellate counsel in the direct appeal from his second resentencing.

On January 4, 2000, the Magistrate Judge entered a findings and recommendation on petitioner's amended petition. On March 15, 2000, respondent filed a motion for reconsideration. Upon reconsideration, the Magistrate Judge filed an amended findings and recommendation on

June 8, 2000. The amended findings and recommendation concluded that the amended petition should be denied on the first ground for relief, conditionally granted on the fourth ground for relief, and denied as premature on the second and third grounds for relief; and that the state of Oregon should be required to reinstate petitioner's direct appeal from his second resentencing and appoint counsel to represent him on that appeal.

B. Ineffective Assistance of Appellate Counsel.

In his fourth ground for relief, petitioner contends that his legal representation in his direct appeal from the second resentencing was unconstitutionally ineffective under Anders v. California, 386 U.S. 738 (1967), and Smith v. Robbins, 528 U.S. 259, 120 S.Ct. 746 (2000). The Magistrate Judge recommended that petitioner's petition be conditionally granted on this ground, and that his appeal be reinstated. The basis for the Magistrate Judge's recommendation was her finding that the appellate procedures set forth in State v. Balfour, and followed by petitioner's counsel in his appeal from the second resentencing, are unconstitutional under Anders and Smith v. Robbins.

In Smith v. Robbins, the Supreme Court reviewed Anders and subsequent cases on the issue of procedures for appointed attorneys representing indigent defendants on possibly frivolous appeals. The Court then analyzed the procedures adopted by California in 1979 in response to Anders (hereafter, the Wende procedures). The Court found the Wende procedures to be constitutional, reversing the Ninth Circuit's contrary holding. The Wende procedures at issue in Smith v. Robbins do not permit appeliate counsel to withdraw, but do require the appel-

late court to review the trial record. Oregon's response to Anders is the procedures [*sic*] set forth in Balfour. Balfour procedures also do not permit counsel to withdraw, but do not require the appellate court to review the trial record.

In adopting the Balfour procedures in 1991, the Oregon Supreme Court reasoned that "the federal constitution requires an Anders brief only when counsel seeks to withdraw." Balfour, 311 Or. at 450. The court went on to say that if counsel does not seek to withdraw, "the core constitutional concerns for which the Anders brief were designed disappear," and that

> [A]ppropriate procedures, other than an Anders brief, can meet Anders' central concern – that an indigent appellant in a criminal case shall receive legal representation and meaningful access to appellate review on terms essentially equal to the representation and access available to a nonindigent appellant.

Id. at 450-51. The Oregon Supreme Court noted specifically that under the Balfour procedures, "review of the entire record by the appellate court in the direct appeal is not required." Id. at 454.

The Magistrate Judge found that Smith v. Robbins clarifies (rather than states a new rule) that Anders procedures (which include a review of the trial record by the appellate court) are not limited to situations where counsel seeks to or is permitted to withdraw. The Magistrate Judge found that (1) the major difference between the Wende procedures approved in Smith v. Robbins and the Balfour procedures is the role of the appellate court; (2)

Smith v. Robbins clarifies that procedures permitting counsel to not raise or brief issues are constitutionally adequate only where the record will also be reviewed by the appellate court; and (3) this was the rule of [the] 1967 decision in Anders.

The Magistrate Judge therefore accepted petitioner's argument that he was denied effective assistance of appellate counsel because his counsel's appellate brief was prepared pursuant to the procedures set forth in Balfour. She found that Oregon's Balfour procedures are unconstitutional in that they do "not afford adequate and effective appellate review for criminal indigents." Amended F&R, p. 32. The Magistrate Judge determined that the fatal flaw in the Balfour procedures is that they do not require a second level of review of the trial record by the appellate court to ensure that appointed appellate counsel has properly determined that an indigent defendant's appeal is frivolous.

I agree with the Magistrate Judge that the U.S. Supreme Court's upholding of the Wende procedures in Smith v. Robbins is closely tied to the fact that the Wende procedures require the appellate court to conduct its own review of the record. Further, if the above reasoning is correct, a petitioner who had not procedurally defaulted a claim that the Balfour procedures are unconstitutional would prevail on the merits.

As discussed below, however, whether a two-tier review has always been required by Anders, with Smith v. Robbins simply clarifying the rule, is a more difficult question that leads in this case to the issue of whether relief can be granted to a petitioner on this basis in a collateral proceeding.

C. Retroactive Application of New Rule.

Neither party raised, briefed, or argued before the Magistrate Judge the issue of retroactive application of a new rule under Teague v. Lane, 489 U.S. 288 (1989). The issue also was not briefed or argued before this court until respondent raised it in oral argument and the court thereafter requested supplemental briefing.

Respondent argues that petitioner's request for a new appeal on the grounds that the appellate procedures outlined in Balfour are unconstitutional should be denied because Teague does not permit application of a new rule of criminal procedure in a federal habeas proceeding.

Petitioner responds that Teague restricts the availability of remedies to persons whose convictions have become final wen a new, more favorable, rule of criminal procedure is established. Petitioner argues that when his conviction became final, Anders was the law and Anders required a two-tier review. Thus, petitioner asserts, there is no new rule and no issue of retroactive application of a new rule, and Teague is not applicable.

The application of Teague is a threshold question in a federal habeas case. Goeke v. Branch, 514 U.S. 115, 117 (1995). Except for two limited exceptions, a state prisoner seeking federal habeas relief cannot benefit from a "new" court-made rule. Teague, 489 U.S. at 310. A new rule for Teague purposes is one where the result was not dictated by precedent existing at the time the defendant's conviction became final. Goeke, 514 U.S. at 118. The question, then, is "whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to

conclude that the rule [he] seeks was required by the Constitution." Saffle v. Parks, 494 U.S. 484, 488 (1990).

The purpose of the Teague doctrine is to ensure that state convictions are not invalidated by federal courts based upon principles of constitutional law of which the state courts were unaware at the time the convictions became final. Coe v. Thurman, 922 F.2d 528, 534 (9th Cir. 1990). The Teague inquiry is frequently stated in terms of whether the rule "imposes a new obligation on the States...." Id., Butler v. McKellar, 494 U.S. 407, 412 (1990). The Teague line of cases seeks to have new rules announced on direct review, instead of in collateral proceedings. Coe v. Thurman, 922 F.2d at 534.

At the time petitioner's conviction became final in July 1995, Anders was the law with respect to procedures for possibly frivolous indigent appeals, and Balfour was Oregon's response to Anders. Petitioner argues that Anders clearly and always required a two-tier review and that, as a result, Balfour has always been unconstitutional.

The pivotal question in this case, for purposes of a Teague analysis, is whether an Oregon state court considering petitioner's claim at the time his conviction became final in 1995 would have felt compelled by existing precedent to conclude that the rule petitioner now seeks was required by the Constitution. O'Dell v. Netherland, 521 U.S. 151, 156 (1997). On the one hand, there has never been an explicit holding from the Supreme court that a two-tier review is required to be a part of appellate procedures for indigent appeals, and Smith v. Robbins emphasizes the Court's position that states are free to adopt procedures for possibly frivolous indigent appeals

that differ from those set forth in Anders, as long as those procedures adequately safeguard a defendant's right to appellate counsel. Smith v. Robbins, 120 S.Ct. at 759. Because of the lack of an explicit holding and the ambiguity of Anders and subsequent cases on the issue of appellate court review of the record, a good argument can be made that Smith v. Robbins now requires a two-tier review, but that that requirement is a "new" rule for Teague purposes because it "break[s] new ground" and "impose[s] a new obligation on the State." Teague at 301. Further, a result is dictated by prior precedent only if the result was "apparent to all reasonable jurists." Lambrix v. Singletary, 520 U.S. 518, 527-28 (1997). Arguably the requirement of a two-tier review was not "apparent to all reasonable jurists," given the fact that the reasonable jurists of the Oregon Supreme Court in Balfour interpreted Anders to mean that an Anders brief (with a two-tier review) was required only when counsel sought to withdraw. Balfour at 450-51.

On the other hand, the Ninth Circuit has clearly indicated its position, although in dicta, that even prior to the Supreme Court's decision in Smith v. Robbins, an independent review by the state court judges was required by Anders. (The Ninth Circuit's statement to this effect appears in Robbins v. Smith, 152 F.3d 1062 (9th Cir. 1997), which was reversed on grounds unrelated to the statement in Smith v. Robbins, the Supreme Court case discussed above). In the context of discussing what the court believed to be in the infirmities of the Wende procedures with respect to the obligations of appellate counsel, the Ninth Circuit noted: "We only address the obligations of appellate counsel in this decision. Our opinion in no way relieves the state court judges of their obligation under Anders or Wende to conduct their own inde-

pendent review of the proceedings to decide whether the appeal is wholly frivolous." Robbins v. Smith, 152 F.3d at 1067 n.2.

In addition, although not discussed in the majority opinion, one of the dissenting opinions in the Supreme Court case of Smith v. Robbins refers to the Teague question raised by the state in that case, and notes that "[o]nce general rules are announced they do not become 'new' again with every particular violation that may subsequently occur." Smith v. Robbins, 120 S.Ct. at 773 (Souter, J., dissenting). Thus the dissent indicates that the majority opinion was premised on the court's determination that Teague did not bar consideration of issues of indigent appellate procedures in a collateral appeal because Smith v. Robbins did not announce new rules, but merely clarified existing rules. Thus, there is some support from both the Ninth Circuit and Supreme Court for the proposition that Anders required a two-tier review, and that subsequent cases interpreting Anders (including Smith v. Robbins) do not constitute "new" rules for purposes of Teague.

In conclusion, if the foregoing reasoning is correct and the claim was not procedurally defaulted, a petitioner bringing a claim in a collateral proceeding alleging the unconstitutionality of the Balfour procedures would prevail on the merits and would not be barred by Teague.

D. Procedural Default/Ineffective Assistance of Appellate Counsel.

In its objections and at oral argument on September 14, 2000, respondent continued to press its position that petitioner's claim of ineffective assistance of appellate counsel alleged in his PCR brief to the Oregon Court of appeals is procedurally defaulted. Respondent argues that

the Magistrate Judge erroneously determined the federal claim was properly before the Oregon Court of Appeals even though petitioner did not mention or cite to the federal constitution or any federal law.

A state prisoner must exhaust all available state court remedies either on direct appeal or through collateral proceedings before a federal court may consider granting habeas corpus relief. Keeney v. Tamayo-Reyes, 504 U.S. 1, 9 (1992). To satisfy the exhaustion requirement, a habeas petitioner must "fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." Duncan v. Henry, 513 U.S. 364, 365 (1995). Habeas corpus relief must be denied if the petitioner has procedurally defaulted on a claim in state court. Murray v. Carrier, 477 U.S. 478, 485 (1986). A claim is procedurally defaulted "if the petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." Coleman v. Thompson, 501 U.S. 722, 734 n.1 (1991).

The Magistrate Judge found that petitioner's ineffective assistance of appellate counsel claim was both raised and decided at the PCR trial court level, where petitioner specifically invoked the Sixth and Fourteenth Amendments to the United States Constitution. Further, indicating that it was a "close call," the Magistrate Judge found that petitioner's claim had been exhausted because petitioner "did fairly present that claim to the Oregon court of Appeals." Amended F&R, p. 17. She found that although petitioner did not specifically mention federal law, he did his best in his portion of the Balfour brief (prepared following the appellate procedures set forth in

State v. Balfour, 311 Or. 434, 814 P2d 1069 (1991)) to point out the alleged failings of his appellate counsel and to raise those failings as a federal question. The Magistrate Judge concluded that his efforts were sufficient to "fairly present" the claim to the Oregon Court of Appeals and that, therefore, the claim was before the Oregon Supreme Court when it denied petitioner's petition for review.

I agreed with the Magistrate Judge on this issue until a November 13, 2000, decision by the Ninth Circuit Court of appeals made it clear that a procedural default had occurred here.

In Lyons v. Crawford, No. 99-17351, 2000 WL 1687808 (9th Cir. Nov. 13, 2000), the court held that a petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available state remedies only if he characterizes the claims raised in state proceedings specifically as federal claims. Lyons at *3. The court explained that "the petitioner must have either referenced specific provisions of the federal constitution or statutes or cited to federal case law," even if the federal basis is self-evident. Id. since the petitioner in Lyons "did not identify explicitly the claims at issue as federal claims, in that he cited neither provisions of federal law nor decisions of federal courts," his claims were unexhausted and could not proceed in federal court. Id.

The Lyons court also rejected the petitioner's argument that the required level of explicitness is diminished for petitioners who argue pro se in state court. The court referred to its recent decision in Gatlin v. Madding, 189 F.3d 882, 889 (9th Cir. 1999), wherein it held that the court is "not obliged to construe [petitioners'] papers liberally merely because [they were] proceeding pro se" in

state court. Lyons at *2 (quoting Gatlin at 889). The court further noted that the Gatlin court cited Rose v. Lundy, 455 U.S. 509, 520 (1982), for the proposition that the standards of explicitness apply equally to pro se litigants. Id. Therefore, the Lyons court concluded, "[t]he law of this circuit is plainly that a federal claim has not been exhausted in state court unless the petitioner both raised the claim in state court and explicitly indicated then that the claim was a federal one – regardless of whether the petitioner was proceeding pro se." Id.

In this case, in his section of the Balfour brief, petitioner did not mention or cite to the federal constitution or any federal (or state) case law for his claim for ineffective assistance of appellate counsel. Further, petitioner is now barred by the time limits set forth in Oregon statutes from filing additional appeals on this claim. Or. Rev. Stat § 138.071 (1996). Thus, because of the holding of the Ninth Circuit in Lyons, I am compelled to conclude that petitioner's fourth ground for relief was not exhausted in the state courts, and is now procedurally defaulted.

E. Second and Third Grounds for Relief.

The Magistrate Judge recommended that petitioner's second and third grounds for relief (respectively, waiver of right to counsel and vindictive sentencing in his second resentencing) be denied as premature pending resolution of petitioner's reinstated direct appeal from his second resentencing. The Magistrate Judge found that the two claims had not been exhausted because they had not been presented to the Oregon Supreme Court, and therefore could not be resolved by a federal court in habeas proceeding.

Petitioner's second and third grounds will remain unexhausted, because I have concluded that petitioner is not entitled to reinstatement of his direct appeal from his second resentencing. Further, petitioner is now barred by the time limits in Oregon statutes from filing any additional appeals on these claims. Or. Rev. Stat. § 138.071 (1996). Thus, petitioner's second and third grounds for relief are procedurally defaulted and must be denied.

F. Conclusion

Based upon the foregoing, I adopt the Magistrate Judge's findings and recommendation that the amended petition be denied as to the first ground for relief. I decline to adopt the Magistrate Judge's findings and recommendation as to the second, third, and fourth grounds for relief; those claims are denied and the state of Oregon is not required to reinstate petitioner's direct appeal from his second resentencing.

IT IS SO ORDERED.

Dated this 27 day of November, 2000.

s/James A. Redden
James A. Redden
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MICHAEL REESE,

Petitioner,

v.

GEORGE H. BALDWIN,

Respondent.

Civil No. 98-851 ST

Judgment

Based on the record,

IT IS ORDERED AND ADJUDGED that Petitioner's amended habeas corpus petition is denied and judgment is entered in favor of respondent.

IT IS SO ORDERED.

Dated this 6th day of December, 2000.

s/James A. Redden
James A. Redden
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL REESE,
Petitioner-Appellant,

v.

GEORGE H. BALDWIN,
Respondent-
Appellee.

No. 01-35153

D.C. No. CV-98-00851-DJ
District of Oregon, Portland

ORDER

Before: HUG, T.G. NELSON and GOULD, Circuit Judges.

Judges Gould and Hug have voted to deny the petition for panel rehearing, and Judge Nelson has voted to grant the petition for rehearing. Judge Gould has voted to deny the petition for rehearing en banc, and Judge Hug has recommended the same. Judge Nelson would vote to grant the petition for rehearing en banc.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote or the Petition for Rehearing En Banc. Fed. R. App. P. 35.

The Petition for Rehearing is DENIED. Appellant's Petition for Rehearing En Banc is also DENIED.